

REMARKS

Claims 1-12 are now pending in the present application. Claim 5 has been amended and Claim 13 has been cancelled without prejudice. The specification has been amended in accordance with Examiner's comments regarding the length of the Abstract and the current status of the parent application.

PROVISIONAL REJECTIONS – DOUBLE PATENTING

Examiner has rejected claims 1-12 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-19 of U.S. Patent No. 6,620,448 B2 in view of Keller (U.S. Patent No. 4,869,911). While Applicants would dispute Examiner's characterization that it would have been obvious to one skilled in the art to incorporate the farinaceous materials and moisture levels of Keller '911, in order to expedite the prosecution of the instant Application, Applicants have submitted a terminal disclaimer to obviate Examiner's assertion of double patenting. Therefore, Applicants respectfully request the provisional rejections be withdrawn.

CLAIM REJECTIONS – 35 U.S.C. § 112, SECOND PARAGRAPH

Claim 5

The Examiner has rejected claim 5 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter, which Applicant regards as the invention. Claim 5 has been amended to clarify and distinctly claim the subject matter. Therefore, Applicant respectfully requests reconsideration and withdrawal of the Examiner's rejection based upon 35 U.S.C. § 112, second paragraph.

CLAIM REJECTIONS – 35 U.S.C. §103(a)

Claims 1-11

The Examiner rejected claims 1-11 under 35 U.S.C. §103(a), as being unpatentable over Keller (U.S. Patent No. 4,869,911) in view of Weinstein et al. (U.S. Patent No. 5,639,485). The Examiner has stated that:

Keller ['911] teaches a method comprising the steps of plasticizing a farinaceous food mixture containing 5-17% plasticizer (column 2, line 22) including monosaccharides, polysaccharides, and alcohols (column 3, lines 12-51), a moisture content of 9-17% (column 2, line 25), directing the flow to a central passage of a co-rotating twin screw extruder (column 4, lines 8-17), extruding the flow through a nozzle (column 4, line 51), the product having a moisture content of 4-8% and water activity level of 0.30-0.45 (column 2, line 35), the plasticizer including 4-6% corn syrup solids, 0.5-2.0% sucrose, 3-6% polydextrose, and 0.5-2.5% glycerol (column 3, lines 53-59), 6-15% plasticizer (column 4, line 1), corn meal (column 3, line 3), and a reduction in cross-sectional area of about 9.2:1 (column 4, lines 51-63). Keller ['911] does not recite imparting a cleft and injecting a fluid additive, a die insert with a capillary channel and peripheral reservoir manifold, and a fluid supply port and fluid additive source. Weinstein et al. ['485] teach a method of extruding complex patterns by using a die insert to impart a cleft (Figure 2, #20), injecting a fluid additive into the cleft (Figure 4, #48), capillary channels (Figure 3, #52, 54, 56), a peripheral reservoir (Figure 4, #58), and a fluid supply port and source (Figure 2, #18). It would have been obvious to one of ordinary skill in the art to incorporate the fluid injection means of Weinstein et al. ['485] into the invention of Keller ['911] since both are directed to methods of extruding farinaceous materials, since Keller ['911] already included the concept of co-extrusion (column 5, lines 17-35), and since the fluid injection means of Weinstein et al. ['485] provided an effective means for providing multi-colored food product with complex patterns which were valued by consumers (column 1, lines 5-34).

This rejection is respectfully traversed. Claims 1-11 are non-obviousness despite the teachings of Keller '911 in view of Weinstein et al. '485. The prior art cited by Examiner does not, either alone or in combination, teach or disclose every element of Applicants' invention. Applicants' method of injection is fundamentally different from that disclosed in Weinstein et al. '485. The subject method of injection uses capillary channels, which are fluidly connected to the reservoir manifold, to inject a continuous band of fluid additive into the flowing extrudate. Conversely, Weinstein et al. '485 requires "evenly spaced food color injection ports 48" in addition to the capillary channel to inject an additive into "interstitial gaps" imparted into the dough. (see Weinstein et al. '485: column 5, lines 33-41) Thus, the injection method of the present invention need not rely upon an interstitial gap to distribute the food color additive.

In addition, with regard to Claims 8 and 9, the reductions of cross sectional area specified are less than the minimum requirement of 25:1 as disclosed in Weinstein et al. '485 (see Weinstein et al. '485: column 4, line 65 – column 5, line 7).

It is well established that as a part Examiner's burden to establish a *prima facie* case of obviousness, Examiner is required to show that the referenced teachings "appear to have suggested the claim subject matter." *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143, 147 (C.C.P.A. 1976). As stated by the Federal Circuit, "Obviousness cannot be established by combining teachings of the prior art to produce the claimed invention, absent some teaching suggestion or incentive supporting the combination." *In re Geiger*, 815 F.2d 683, 2 USPQ 2d

1276, 1278 (Fed. Cir. 1987). Neither Keller '911 nor Weinstein et al. '485, either alone or in combination, teach or disclose every element of Applicant's invention. Examiner's failure to provide the necessary suggestion or motivation for the combination of Keller '911 in view of Weinstein et al. '485 creates a presumption that the combination selected by Examiner to support the obviousness rejection is based on hindsight. Examiner has not established a *prima facie* case of obviousness, and the rejection of Claims 1-11 should be withdrawn.

Claim 12

The Examiner rejected claim 12 under 35 U.S.C. §103(a), as being unpatentable over Keller (U.S. Patent No. 4,869,911), in view of Weinstein et al., (U.S. Patent No. 5,639,485), as applied above, and further in view of Parsons et al. (U.S. Patent No. 6,509,049). The Examiner has stated that:

Keller [911] and Weinstein et al. [485] teach the above mentioned concepts. Keller [911] and Weinstein et al. [485] do not recite a static mixer. Parsons et al. [049] teach a food extruder including static mixer elements (Figure 1, #46). It would have been obvious to one of ordinary skill in the art to incorporate the static mixer of Parsons et al. [049] into the invention of Keller [911], in view of Weinstein et al. [485], since all are directed to methods of extruding foods, since Weinstein et al. [485] was directed to making complex patterns in the extruded product (abstract), and since the static mixer elements of Parsons et al. [049] would have provided a means for making a swirled or marbled effect (column 7, line 13).

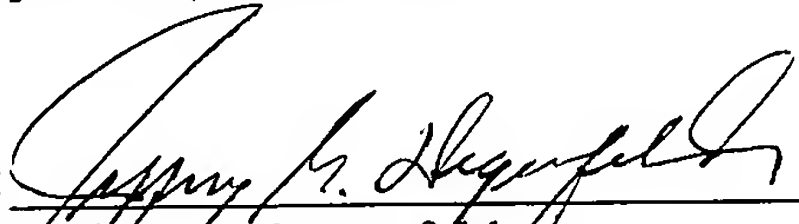
This rejection is respectfully traversed. Claim 12 is non-obviousness despite the teachings of Keller '911 in view of Weinstein et al. '485 and Parsons et al. '049. Claim 12 depends from Claim 1, which includes the injection step limitation discussed previously. Parsons et al. '049 does not include any disclosure which would teach or suggest the specifics of the subject injection step limitation discussed on the preceding page. Absent the Examiner pointing out some teaching or incentive to implement the subject injection step limitation, one of ordinary skill in the art would not be led to modify Keller '911, in view of Weinstein et al. '485, and further in view of Parsons et al. '049 to reach the present invention when the reference is examined as a whole. Absent some teaching, suggestion, or incentive to modify Keller '911 and Weinstein et al. '485 in this manner, the presently claimed invention can be reached only through an improper use of hindsight using the Applicants' disclosure as a template to make the necessary changes to reach the claimed invention. Therefore, Applicants respectfully request that the rejection of Claim 12 be withdrawn.

CONCLUSION

Applicants believe the application is now in condition for allowance. If there are any outstanding issues that the Examiner feels may be resolved by way of a telephone conference, the Examiner is cordially invited to contact Jeffrey G. Degenfelder at 972.367.2001.

The Commissioner is hereby authorized to charge any additional payments that may be due for additional claims to Deposit Account 50-0392.

Respectfully submitted,

By: 
Jeffrey G. Degenfelder
Registration No. 44,647
Attorney for Applicants

Date: February 28, 2006

CARSTENS & CAHOON, LLP
P.O. Box 802334
Dallas, TX 75380
(972) 367-2001 Telephone
(972) 367-2002 Facsimile